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In The

Supreme Court of the United States

COUNTY OF LOS ANGELES and
LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,

Petitioners,

vs.

VALERIE ANN STREIT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

ARGUMENT 5

I. *STREIT* CORRECTLY APPLIED *McMILLIAN* AND DETERMINED THAT IN CALIFORNIA SHERIFFS MANAGE JAILS ON BEHALF OF COUNTIES 5

II. *STREIT* IS CONSISTENT WITH OTHER STATE AND FEDERAL CASES APPLYING THE *McMILLIAN* ANALYSIS 12

A. Cases Arising In California 12

B. Cases Arising In Other Jurisdictions 18

1. Jail Management and Administration .. 19

2. Law Enforcement 19

3. Employment and Personnel Policies ... 21

4. Staffing Courts and Executing Process ... 21

III. LIABILITY OF THE SHERIFF'S DEPARTMENT – ITSELF A SEPARATE SUABLE ENTITY – IS NOT ADDRESSED BY THIS PETITION 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Abraham v. Piechowski, 13 F.Supp.2d 870 (E.D. Wis. 1998) 19

Aleman v. Milwaukee County, 35 F.Supp.2d 710 (E.D. Wis. 1999) 21

Alencastro v. Sheahan, 297 Ill.App.3d 478, 698 N.E.2d 1095 (1998) 2, 21

Asgari v. City of Los Angeles, 15 Cal.4th 744, 937 P.2d 273, 63 Cal.Rptr.2d 842 (1997) 18

Beck v. County of Santa Clara, 204 Cal.App.3d 789, 251 Cal.Rptr. 444 (1988) 3, 6

Brady v. Fort Bend County, 145 F.3d 691 (5th Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999) .. 20, 21

Brandt v. Board of Supervisors, 84 Cal.App.3d 598, 147 Cal.Rptr. 468 (1978) 11

Brewster v. County of Shasta, 112 F.Supp.2d 1185 (E.D. Cal. 2000) 13

Burge v. Parish of St. Tammany, 187 F.3d 452 (11th Cir. 1999) 22

Cabrales v. County of Los Angeles, 864 F.2d 1454 (9th Cir. 1988), *cert. granted and remanded on other grounds*, 490 U.S. 1087 (1989), *reinstated*, 886 F.2d 235 (9th Cir.), *cert. denied*, 494 U.S. 1091 (1990) 12

Carter v. City of Philadelphia, 181 F.3d 339 (3d Cir.), *cert. denied sub nom. Roe v. Carter*, 528 U.S. 1005 (1999) 22

TABLE OF AUTHORITIES – Continued

Page

Cash v. Granville County Bd. of Educ., 242 F.3d 219 (4th Cir. 2001) 20

County of Los Angeles v. Superior Court (Peters), 68 Cal.App.4th 1166, 80 Cal.Rptr.2d 860 (1989) 3, 4, 6, 17, 18

DeGenova v. Sheriff of DuPage County, 209 F.3d 973 (7th Cir. 2000) 2, 19, 23

Dibb v. County of San Diego, 8 Cal.4th 1200, 884 P.2d 1003, 36 Cal.Rptr.2d 55 (1994) 8

Fletcher v. Georgia, 92 F.Supp.2d 1377 (S.D. Ga. 2000) 20

Franklin v. Zaruba, 150 F.3d 682 (7th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999) 20, 23

Harter v. Vernon, 101 F.3d 334 (4th Cir. 1996), *cert. denied*, 521 U.S. 1120 (1997) 20

Hawkins v. Comparet-Cassani, 33 F.Supp.2d 1244 (C.D. Cal. 1999), *rev'd in part on other grounds*, 251 F.3d 1230 (9th Cir. 2001) 13

Henry v. County of Shasta, 132 F.3d 512 (9th Cir. 1997), *amended*, 137 F.3d 1372, *cert. denied sub nom. Pope v. Henry*, 525 U.S. 819 (1998) 11

Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994) 9

Howlett v. Rose, 496 U.S. 356 (1990) 16

Jeffes v. Barnes, 208 F.3d 49 (2d Cir.), *cert. denied sub nom. County of Schenectady v. Jeffes*, 531 U.S. 813 (2000) 2, 21

Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989) 7

TABLE OF AUTHORITIES – Continued

Page

Knight v. Vernon, 214 F.3d 544 (4th Cir. 2000)..... 23

Leon v. County of San Diego, 115 F.Supp.2d 1197 (S.D. Cal. 2000)..... 12

Martinez v. California, 444 U.S. 277 (1980)..... 17

McMillian v. Monroe County, 520 U.S. 781 (1997) ....*passim*

Modoc County v. Spencer, 103 Cal. 498, 37 P. 483 (1894)..... 15, 16, 18

Monell v. Department of Social Services, 436 U.S. 658 (1978)..... 1, 5, 23

Montiel v. Holcombe, 199 So. 245 (Ala. 1940) 11

Myers v. County of Orange, 157 F.3d 66 (2d Cir. 1998), *cert. denied*, 525 U.S. 1146 (1999) 22

Open Inns, Ltd. v. Chester County Sheriff's Dep't, 24 F.Supp.2d 410 (E.D. Pa. 1998)..... 20

Parker v. Amerson, 519 So.2d 442 (Ala. 1987).....6, 11

Pharris v. Looper, 6 F.Supp.2d 720 (M.D. Tenn. 1998)..... 22

Pitts v. County of Kern, 17 Cal.4th 340, 949 P.2d 920, 70 Cal.Rptr. 823 (1998)..... 14, 15, 16, 18

Ramsey v. Schauble, 141 F.Supp.2d 584 (W.D.N.C. 2001) 19

Redman v. County of San Diego, 942 F.2d 1435 (9th Cir.), *cert. denied*, 502 U.S. 1074 (1991)..... 11

Reed v. Hammond, 18 Cal.App. 442, 123 P. 346 (1912)..... 11

TABLE OF AUTHORITIES – Continued

Page

Roe v. County of Lake, 107 F.Supp.2d 1146 (N.D. Cal. 2000) 13

Spurlock v. Sumner County, 42 S.W.3d 75 (Tenn. 2001) 2, 20

Streit v. County of Los Angeles, 236 F.3d 552 (9th Cir. 2001) ..... *passim*

Sullivan v. County of Los Angeles, 12 Cal.3d 710, 527 P.2d 865, 117 Cal.Rptr. 241 (1974) 3, 11, 17

Turquitt v. Jefferson County, 137 F.3d 1285 (11th Cir.), *cert. denied*, 525 U.S. 874 (1998) 19

Von Colln v. County of Ventura, 189 F.R.D. 583 (C.D. Cal. 1999) 12

Weiner v. County of San Diego, 210 F.3d 1025 (9th Cir. 2000) 14, 15, 16

STATUTES AND RULES

42 U.S.C. § 1983 .....1, 5, 11, 12, 13

U.S. Sup. Ct. R. 10 .....1, 4

Cal. Gov't Code § 815.2 .....5, 8

Cal. Gov't Code § 23013 3

Cal. Gov't Code § 25303 3

OTHER AUTHORITIES

52 Ops. Cal. Att'y Gen. 228 (1969) 11

De Santis & Renner, *Governing the County*, in *County Governments in an Era of Change* (P. Berman ed. 1993) 21

STATEMENT OF THE CASE

Streit v. County of Los Angeles, 236 F.3d 552 (9th Cir. 2001), is a thoughtful, well-founded and routine application of the principles set forth in *McMillian v. Monroe County*, 520 U.S. 781 (1997), for determining which government officials are final policymakers for entity defendants sued under 42 U.S.C. § 1983. The Ninth Circuit, like other courts publishing decisions on the issue, experienced no difficulty applying *McMillian*. No significant conflicts have developed among the federal or state courts. In short, the standards of rule 10 have not been met and this petition should be denied.

Streit arises from interlocutory appeals in a number of related cases alleging that Los Angeles County Sheriff's policies and practices unreasonably delayed releases from the Los Angeles County Jail. The Ninth Circuit affirmed the trial court's denials of motions for summary judgment and motions to dismiss brought by petitioners County of Los Angeles and Los Angeles County Sheriff's Department. It rejected petitioners' contention that a California sheriff acts on behalf of the State when managing a county jail, thus permitting respondents to maintain claims against petitioners pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978).[1] *Streit* and the related cases remain pending in the trial court, with no trial date set.

McMillian examined specifics of Alabama law and held that an Alabama sheriff, when engaged in a law

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[1] There are other federal and state claims for relief pending in the district court that are not related to the issues raised in the certiorari petition.

enforcement function, acts on behalf of the state rather than a county. *McMillian*, however, rejected "a uniform, national characterization for all sheriffs," noting that "States have wide authority to set up their state and local governments as they wish," and that "the importance of counties and the nature of county government have varied historically from region to region, and from State to State." 520 U.S. at 795. Since "both the role of sheriffs and the importance of counties vary," "sheriffs [may] be county officers in one State, and not in another." *Id.* at 795. Moreover, *McMillian* recognized that sheriffs, like other officials, may perform a wide range of functions, and for some of those functions the sheriffs may be the "final policymakers for the local government," but in other areas may "represent[ ] the state." *Id.* at 785-86.

Streit too considered the role of a sheriff, but in a different state – California – and a different function – jail management.[2] Using the *McMillian* framework, it

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[2] The cases decided thus far under *McMillian* have identified at least four distinct sheriff functions: (1) operating county jails, *see, e.g., DeGenova v. Sheriff of DuPage County*, 209 F.3d 973 (7th Cir. 2000), (2) investigating crimes and other law enforcement duties, *see e.g., Spurlock v. Sumner County*, 42 S.W.3d 75 (Tenn. 2001), (3) employing, retaining and promoting employees to carry out the functions of the Department, *see, e.g., Jeffes v. Barnes*, 208 F.3d 49 (2d Cir.), *cert. denied sub nom. County of Schenectady v. Jeffes*, 531 U.S. 813 (2000), and (4) staffing state courts as bailiffs and executing their writs, warrants and other orders, *see, e.g., Alencastro v. Sheahan*, 297 Ill.App.3d 478, 698 N.E.2d 1095 (1998). Without question, the function at issue in this case is jail management, but petitioners repeatedly refer to it as "law enforcement." (*See, e.g.*, Pet. Cert. at i (misleading question presented), 10, 14 and 15).

determined that in California the sheriff is generally a county official, and that in California jail management is a matter of local policymaking and control. *Streit* identified the considerable differences between the respective roles of sheriffs in Alabama and California governments, and stressed that the California legislature gives its county governments broad fiscal and administrative powers over the management of jails, Cal. Gov't Code § 25303, as well as the power to take jail management away from the Sheriff altogether, *id.* § 23013.[3] Significantly, *Streit* recognized that long before *McMillian*, the California Supreme Court, in *Sullivan v. County of Los Angeles*, 12 Cal.3d 710, 717, 527 P.2d 865, 868, 117 Cal.Rptr. 241, 244 (1974), imposed tort liability on the County for the sheriff's failure to release people from county jail in a timely fashion. *Streit*, 236 F.3d at 561-62.[4]

Petitioners urge the Court to grant certiorari, contending that *Streit* conflicts with *County of Los Angeles v. Superior Court (Peters)*, 68 Cal.App.4th 1166, 80

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[3] Both the petition and the amicus brief omit discussion of § 23013 and do not mention the California appellate decision upholding a county's transfer of jail responsibilities away from its sheriff, *Beck v. County of Santa Clara*, 204 Cal.App.3d 789, 251 Cal.Rptr. 444 (1988), despite *Streit*'s reliance on both the statute and the case. *See* 236 F.3d at 561.

[4] Both the petition and the amicus brief omit any mention of *Sullivan*, the controlling California Supreme Court case on county liability for over detention of county jail inmates, despite the Ninth Circuit's noting the opinion to be of "particular importance to our analysis." 236 F.3d at 562.

Cal.Rptr.2d 860 (1998) (sheriff acts for state when incarcerating someone on arrest warrant), an intermediate California appellate decision on an interlocutory writ arising from the overruling of a demurrer to a complaint. (*See* Pet. Cert. 7, 22). Because *Peters* was not rendered by a "state court of last resort," however, any conflict between *Streit* and *Peters* would not meet the standards of rule 10(a). Moreover, while there are some differences in the language of the two cases, there is no conflict between their holdings; *Streit* and *Peters* apply *McMillian* to different functions performed by California sheriffs. The decisions in both *Streit* and *Peters* are in accord with dozens of state and federal decisions in California and elsewhere which hold that sheriffs and their deputies are generally county officials, but act on behalf of the state when faithfully carrying out court orders.[5]

The petition for certiorari does not challenge that portion of *Streit* affirming the trial court's conclusion that the Sheriff's Department is a separate suable entity not entitled to Eleventh Amendment immunity. *Streit*, 236 F.3d at 565-67. Even were the sheriff not acting on behalf of the county when over detaining respondents, as urged in the petition, the Sheriff's Department remains exposed

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[5] In *Streit*, one central issue is the sheriff's failure to timely release from jail people ordered released by a state court. Obviously, a sheriff does not act on behalf of a state court when engaging in policies and practices that contravene and frustrate the state court's orders. The situation in *Peters* – where the sheriff attempted to carry out a court order requiring the detention of an individual – presents the exact opposite of the situation in *Streit* – where the sheriff's policies frustrated court orders to release respondents.

to *Monell* liability. Because California law provides that judgments against the sheriff are paid by the county,[6] were this petition granted and the portion of the *Streit* opinion which permits respondents to pursue their *Monell* claims against the County reversed, the posture of the parties would be largely unchanged.

The petition for writ of certiorari should be denied.

ARGUMENT

I. *STREIT* CORRECTLY APPLIED *McMILLIAN* AND DETERMINED THAT IN CALIFORNIA SHERIFFS MANAGE JAILS ON BEHALF OF COUNTIES.

In *McMillian*, the Court, analyzing Alabama constitutional, statutory and decisional law, concluded that for section 1983 purposes Alabama sheriffs are policymakers for the state, and not their respective counties, when performing law enforcement functions. In doing so, the Court identified several unique and historically specific aspects of Alabama law that influenced its decision and directed the lower courts to conduct state-by-state and function-by-function inquiries when applying *McMillian* in other situations.

Unlike California and many other states, Alabama expressly makes its sheriffs members of the State Executive Committee, along with the Governor and other statewide officials. *McMillian* relied primarily on the "historical development" of the Alabama Constitution, especially

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[6] Cal. Gov't Code § 815.2.

the turn-of-the-century amendments which incorporated sheriffs into the executive branch of the state government. 520 U.S. at 786.

These amendments demonstrated "the framers' intent to ensure that sheriffs be considered executive officers of the state." 520 U.S. at 789 (citing *Parker v. Amerson*, 519 So.2d 442, 444 (Ala. 1987)). The purpose of these amendments was to "solidify the place of the sheriffs in the executive department, and to clarify that sheriffs were acting for the State when exercising their law enforcement functions." *Id.* at 788. There are reasons peculiar to the deep south for Alabama's including sheriffs in state government. "Historically, Alabama county sheriffs were squarely placed under state control to stop them from assisting lynch mobs in killing black prisoners." *Streit*, 236 F.3d at 561 n. 11.[7]

McMillian's holding does not create a blanket rule that sheriffs are state policymakers in other states. "[T]here is no inconsistency created by court decisions that declare sheriffs to be county officers in one State, and not in another." 520 U.S. at 795. "A court's task is to 'identify those officials or governmental bodies who speak with *final policymaking authority* for the local governmental actor *concerning the action* alleged to have

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[7] Reflecting historical development in the opposite direction from Alabama's, constitutional amendments in California decentralized power over the sheriff and reinforced county control. In 1970 California deleted constitutional provisions giving the State Legislature authority to define the sheriff's duties, while retaining the provisions giving counties that power. *See Beck v. County of Santa Clara*, 204 Cal.App.3d 789, 796, 251 Cal.Rptr. 444, 448 (1988).

caused the particular constitutional or statutory violation at issue.' " *Id.* at 784-85 (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (emphasis added).

Significantly, when the petitioner in *McMillian* pointed out to the Court that "most Federal Courts of Appeals have found county sheriffs to be county, not state, officials," the *McMillian* Court saw no danger that its conclusion regarding Alabama "will either call these decisions into question or create an unacceptable patchwork of rulings as to section 1983 liability of counties for the acts of their sheriffs. We reject both arguments: The first ignores the history of sheriffs, and the second ignores our Nation's federal nature." *Id.* at 793. While the Court differed over the result of *McMillian's* analysis, the Justices agreed that "[t]he Court's opinion does not call into question the numerous Court of Appeals decisions, some of them decades old, ranking sheriffs as county, not state, policymakers" and that the decision emanated from a "recognition of the historic reasons why Alabama listed sheriffs as members of the State's 'executive department.' " *Id.* at 805 (Ginsberg, J., dissenting).

Following the *McMillian* methodology, the *Streit* court analyzed California's constitutional structure and contrasted it with that of Alabama to determine whether the California sheriff in general makes policy for the state or the county:

> Unlike the Alabama Constitution, the California Constitution does not list sheriffs as part of "the state 'executive department.' " *McMillian*, 520 U.S. at 787, 117 S.Ct. 1734 (finding this designation "especially important" for determining liability). Instead, . . . the California Constitution

> designates sheriffs as county officers. . . . *[S]ee also DeGenova v. Sheriff of DuPage County*, 209 F.3d 973, 976 (7th Cir. 2000) (noting that the Illinois Constitution's designation of sheriffs as county officers "strongly indicates that the Sheriff is an agent for the county, and not the State"). Indeed, "[n]ot only does the California Constitution lack the provisions most important to the Supreme Court's decision in *McMillian*, its provisions read much like those of the Alabama Constitution prior to that State's determined effort to clarify that sheriffs were acting for the State when exercising their law enforcement functions." *Roe v. County of Lake*, 107 F.Supp.2d 1146, 1149 (N.D. Cal. 2000); *see McMillian*, 520 U.S. at 788, 117 S.Ct. 1734. Thus, under the California Constitution, the [Sheriff's Department] is generally a county, not state, agency.

236 F.3d at 561 (footnote omitted).[8]

In concluding that California sheriffs generally act for their counties rather than the state, *Streit* deemed it a "crucial factor" that "[u]nder California law, monetary damages for section 1983 claims are paid by the County and not the state." *Id.* at 562 (citing Cal. Gov't Code § 815.2 and *McMillian*, 520 U.S. at 789 ("strong evidence in favor of the . . . conclusion that sheriffs act on behalf of the State" that Alabama law makes suit against sheriff

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[8] *Streit*'s observation that California sheriffs generally act on behalf of their counties is consistent with the decentralized, "home rule" operating principle of California government. *See Dibb v. County of San Diego*, 8 Cal.4th 1200, 1206-19, 884 P.2d 1003, 1006-15, 36 Cal.Rptr.2d 55, 58-67 (1994) (general purpose of state constitutional provisions is to grant "home rule" to counties by means of charters).

suit against state, and county not liable for acts of sheriff)).[9] Placing emphasis on which entity is financially responsible under state law is consistent with analogous Eleventh Amendment jurisprudence. The "vulnerability of the State's purse [is] the most salient factor in Eleventh Amendment determinations." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994).

Streit did more than determine that California sheriffs generally act on behalf of counties. *Streit* examined jail management, and determined that it too was a county function.

> The California Government Code also supports the conclusion that the [sheriff's department] operates for the County when administering local prison policy. Although the California Attorney General, like the Alabama Attorney General in *McMillian*, has statutory control over the sheriffs in a law enforcement capacity, in California, the counties hold the ultimate power

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[9] In addition to this statute, *Streit* noted other statutes that demonstrate California sheriffs are county policymakers, not state officials.

> In California, sheriffs are elected county officers. . . . Sheriffs are required to have their offices at the county seat with the other county officers . . . ; their vacancies are filled as "provided by law for filling elective county offices;" . . . and their services are contracted out by the counties – not the state. . . . These various state provisions lead inexorably to the conclusion that the [sheriff's department] is tied to the County in its political, administrative, and fiscal capacities. Therefore, the County appears subject to liability for the [sheriff's department]'s actions.

236 F.3d at 562 (footnote omitted).

> over the jails. *Compare* Cal. Gov. Code § 12560 (granting the Attorney General power over the sheriffs' activities relevant to the "investigation or detection of crime"), *with* Cal. Gov. Code § 25303 (granting the county boards of supervisors broad fiscal and administrative powers for the management of the individual county jails so long as the boards do not "obstruct the investigative function of the sheriff of the county"). The counties retain the power to transfer control of a county jail from the sheriff to a county-created department of corrections, suggesting that the counties actually control and operate the jails, and not the state via the sheriffs. Cal. Gov. Code § 23013; *Beck v. County of Santa Clara*, 204 Cal.App.3d 789, 793, 251 Cal.Rptr. 444, 445 (1988). We find that sections 23013 and 25303 weigh heavily in favor of our conclusion that the [sheriff department]'s jail-release policies are a county function and a county concern. *See Dotson v. Chester*, 937 F.2d 920, 928 (4th Cir. 1991) (interpreting a Maryland statute virtually identical to section 23013 and concluding that because "state statutes confer authority on the counties to transfer control of the jail from the sheriff to a county warden," it has "no doubt but that sheriffs are final policymakers *for counties* when operating jails" (emphasis added)). Thus, under these state statutes, the County, not the state, oversees the local jails, and the [sheriff's department], as the administrator of those jails, acts for the County.

Id. at 561-62.

Petitioners contend that *Streit* conflicts with California case law. That is not so. California courts have long

acknowledged that county jails generally are the responsibility of the county, *e.g., Reed v. Hammond*, 18 Cal.App. 442, 123 P. 346 (1912), *cited in* 52 Ops. Cal. Att'y Gen. 228, 230 (1969), and that counties may be held liable for failure "to appropriate sufficient funds" for jail management. *Brandt v. Board of Supervisors*, 84 Cal.App.3d 598, 600, 147 Cal.Rptr. 468, 469 (1978). The California Supreme Court, in a state tort case for money damages for an alleged over-detention in the Los Angeles County Jail – a case factually on all fours with this one – held that "if the county sheriff is liable as a public employee . . . for his alleged failure to release plaintiff from jail after all charges against him were dismissed, then the county will be derivatively liable for those acts." *Sullivan v. Los Angeles County*, 12 Cal.3d 710, 717, 527 P.2d 865, 869, 117 Cal.Rptr. 241, 245 (1974) (footnote omitted).[10]

Streit follows the line of Ninth Circuit cases holding California counties liable under section 1983 for constitutional deficits in their sheriffs' jail administration. Examples of *counties* being exposed to liability for policies in *jails* managed by their sheriffs – cases legally on all fours with this one – include *Henry v. County of Shasta*, 132 F.3d 512, 518 (9th Cir. 1997) (practice of submitting recalcitrant motorists to unpleasant jail conditions), *amended*, 137 F.3d 1372, *cert. denied sub nom. Pope v. Henry*, 525 U.S. 819 (1998), *Redman v. County of San Diego*, 942 F.2d 1435, 1455

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[10] In contrast, long before § 1983 liability became an issue there was an established line of Alabama cases holding that a suit against the sheriff was "essentially a suit against the state." *See, e.g., Montiel v. Holcombe*, 199 So. 245 (Ala. 1940); *Parker v. Amerson*, 519 So.2d 442, 445 (Ala. 1987).

(9th Cir.) (practice not to segregate "aggressive" homosexuals from vulnerable detainees), *cert. denied*, 502 U.S. 1074 (1991), and *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1460-61 (9th Cir. 1988) (affirming judgment against county because "its administrative organ, the Men's Central Jail" was deliberately indifferent to psychological needs of prisoner who, as a consequence, hanged himself), *cert. granted and remanded on other grounds*, 490 U.S. 1087 (1989), *reinstated*, 886 F.2d 235 (9th Cir.), *cert. denied*, 494 U.S. 1091 (1990).

In sum, *Streit* was correctly decided in light of *McMillian* and apposite state and federal precedent. Accordingly, there is no reason for the Court to review the case now.

II. *STREIT* IS CONSISTENT WITH OTHER STATE AND FEDERAL CASES APPLYING THE *McMILLIAN* ANALYSIS.

A. Cases Arising In California

There are six published decisions in addition to *Streit* applying *McMillian* to California sheriffs and two applying it to district attorneys. These holdings do not conflict, and do not suggest that the Court should grant certiorari to clarify the law.

Two district court opinions pre-dating *Streit* held that a county has section 1983 liability for its sheriff's jail management policies. *Von Colln v. County of Ventura*, 189 F.R.D. 583 (C.D. Cal. 1999) (strapping inmates into inhumane "chair"); *Leon v. County of San Diego*, 115 F.Supp.2d 1197 (S.D. Cal. 2000) (indifference to inmates' medical needs). Similarly, there are two district court opinions holding counties have section 1983 liability for their sheriffs' law enforcement practices. *Brewster v. County of*

Shasta, 112 F.Supp.2d 1185 (E.D. Cal. 2000) (investigating crimes); *Roe v. County of Lake*, 107 F.Supp.2d 1146 (N.D. Cal. 2000) (responsiveness to female crime victims).[11]

In *Hawkins v. Comparet-Cassani*, 33 F.Supp.2d 1244 (C.D. Cal. 1999), *rev'd in part on other grounds*, 251 F.3d 1230 (9th Cir. 2001) (deputy sheriff acting as bailiff activated electric belt on order of judge to shock pro per criminal defendant), on the other hand, the district court held that sheriff, when setting policy for the deputy sheriffs who staff the state's superior courts, acted as a

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[11] *Roe* contains an excellent *McMillian* analysis.

> Recognizing that local police power is derived from the State, *McMillian* requires a court to analyze the delegation of that power to determine whether it was sufficiently complete such that a suit for abuse of that power is not a suit against the State. It seems clear from the analysis above that California's delegation of authority to [the county sheriff] is sufficiently complete. It is difficult to see how a judgment against a sheriff who, as is alleged here, permits his office to violate the civil rights of women in the way he maintains his staff and sets his policies, will operate as a judgment against the State. The fact that the sheriff is subject to supervision by the Attorney General does not alter this. Whatever the reality of the functional supervision that the Attorney General exercises over local sheriffs, [the sheriff] is ultimately supervised in Lake County, at least for the policies at issue here. The deterrent effect of paying any judgment plaintiff may obtain will be felt in Lake County. If the public is dissatisfied with the way [the sheriff] treats women victims, he will either not be reelected by the voters of Lake County or he will be impeached before a Lake County grand jury. It is hard to see how any of this will violate California's sovereignty.

107 F.Supp.2d at 1151-52.

policymaker for the state rather than the county. These five cases illustrate the function-by-function approach *McMillian* requires and *Streit* employed.

The California Supreme Court, in *Pitts v. County of Kern*, 17 Cal.4th 340, 345, 949 P.2d 920, 923, 70 Cal.Rptr. 823, 826 (1998), applied *McMillian* and decided that "a California district attorney acts on behalf of the state . . . when preparing to prosecute and while prosecuting criminal violations of state law, and when establishing policy and training employees in these areas." The Ninth Circuit independently reached the same conclusion in *Weiner v. County of San Diego*, 210 F.3d 1025 (9th Cir. 2000).[12] In both cases, the courts stressed the quasi-judicial role played by prosecutors as well as California's

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[12] Both petitioners and their amicus cite *Weiner* with approval (Pet. Cert. at 12-13 n. 6, Amicus Br. at 4-5), although it rejects their central contention that under *McMillian* federal courts must parrot state-court conclusions.

> In *Pitts v. County of Kern*, 17 Cal.4th 340, 70 Cal.Rptr.2d 823, 949 P.2d 920 (1998), the California Supreme Court, following *McMillian*, analyzed California law and held that a district attorney was a state official for purposes of § 1983 liability while acting in his prosecutorial capacity. *See id.* at 928-34. The California Supreme Court is the ultimate interpreter of California state law. *See Johnson v. Fankell*, 520 U.S. 911, 916, 117 S.Ct. 1800, 138 L.Ed.2d 108 (1997). This does not mean, however, that we must blindly accept its balancing of the different provisions of state law in determining liability under § 1983.
>
> In *McMillian*, the Court stated that "our inquiry is dependent on an analysis of state law," which does not mean "that state law can answer the question for us by, for example, simply labeling as a state official

long history of treating district attorneys in their prosecutorial role as state officials. *See, e.g., Weiner*, 210 F.3d at 1030 ("In 1894, the California Supreme Court held that the district attorney . . . '[i]n the prosecution of criminal cases . . . acts by the authority and in the name of the people of the state.' *Modoc County v. Spencer*, 103 Cal. 498, 37 P. 483, 484 (1894).").

Contrary to the petition and the amicus brief, *Weiner* is limited to the function of criminal prosecutions. "Although a California district attorney is a state officer when deciding whether to prosecute an individual, this is not to say that district attorneys in California are state officers for all purposes. To the contrary, California law suggests that a district attorney is a county officer for some purposes." *Id.* at 1031; *accord Pitts*, 17 Cal.4th at 363 ("Our conclusion as to which entity the district attorney represents might differ were plaintiffs challenging a district attorney's alleged action or inaction related to . . . [an] administrative function arguably unrelated to the prosecution of state criminal law violations."); (*but see* Pet. Cert. at 11 ("[D]istrict attorneys are controlled by the State, not the County."); Brief of Amicus Br. at 3 ("Consistent with the California Supreme Court's decision in *Pitts*,

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> an official who clearly makes county policy. But our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's function under relevant state law." *McMillian*, 520 U.S. at 785, 117 S.Ct. 1734 (emphasis added). We must, therefore, examine California's constitution, statutes, and case law.

210 F.3d at 1028-29.

the Ninth Circuit has ruled that district attorneys act on behalf of the State of California and are consequently immune from liability under Section 1983.")).[13]

Finally, there is the intermediate appellate decision in *Peters* on which petitioners and their amicus place so much weight.[14] That case did not involve allegations that

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[13] The California Supreme Court's full quote in *Pitts* from 1894's *Modoc County v. Spencer*, partially quoted in *Weiner*, 210 F.3d at 1030, distinguishes the district attorney's role as a law officer – a county function – from the district attorney's role as a prosecutor – a state function.

> The district attorney in the discharge of his office performs two quite distinct functions. *He is at once the law officer of the county and the public prosecutor of the state.* While in the former capacity he represents the county and is largely subordinate, and under the control of, the board of supervisors, he is not so in the latter. In prosecution of criminal cases he acts by the authority and in the name of the people of the state.

Pitts, 17 Cal.4th at 359 (emphasis added) (quoting *Modoc County v. Spencer*, 103 Cal. 498, 37 P.483, 484 (1894)).

[14] Petitioners argued below that *Peters* controls the outcome of respondents' § 1983 claims in federal court. *Streit* properly rejected that contention. "The elements of, and the defenses to, a federal cause of action are defined by federal law." *Howlett v. Rose*, 496 U.S. 356, 375 (1990). State law is relevant only to the extent it provides the subject matter for analysis. If there is a "substantive disagreement" under state law about "the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law." *Id.* at 377-78. The reason is obvious.

> If we were to uphold the immunity claim in this case, every State would have the same opportunity to extend the mantle of sovereign immunity to "persons" who would otherwise be subject to § 1983

the county jail routinely over detained people ordered released. "The function involved" in *Peters* "is determining whether to release a person who may be subject to arrest on an outstanding warrant." *Peters*, 68 Cal.App.4th at 1177.[15] The warrant was, of course, a court order directing the Sheriff to take the person into custody. Because the sheriff was involved in carrying out the orders of the court, the *holding* of *Peters* harmonizes with the other California-based decisions discussed above.

In any event, *Peters* does not represent a definitive or reliable statement of California law. *Peters* failed to address salient state statutes, key decisions from the California Supreme Court and the distinctions the California Supreme Court made in *Pitts*. *Peters* (like petitioners and their amicus) did not mention *Sullivan v. County of Los Angeles*, the 1975 California Supreme Court case holding that under state law counties are vicariously liable for jail over-detentions caused by policies or acts of the Sheriff's

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> liability. States would then be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People

Id. at 382. "A construction of [§ 1983] which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. . . . The immunity claim is a question of federal law." *Martinez v. California*, 444 U.S. 277, 283 n. 3 (1980).

[15] Both the district court and the court of appeals distinguished *Peters* on this basis. *Streit*, 236 F.3d at 564; Pet. Cert. App. B at B9 (Memorandum Order Denying Motion to Dismiss, filed March 25, 1999).

Department. *Peters* did not address California Government Code section 23013, the statute giving county governments the power to strip the sheriff of jail management responsibilities. *Peters* did not address the distinction between the prosecutorial function and the law officer function for which the California Supreme Court in *Pitts* cited *Modoc*, a central component of *Pitt's* analytical framework.[16] These flaws in *Peters* suggest the sort of "blatant effort to shield . . . local governments from liability" cautioned against in *McMillian*. *See* 520 U.S. at 796.

B. Cases Arising In Other Jurisdictions.

In the brief time since *McMillian* was decided, the lower federal and state courts have applied its analysis to a wide variety of cases involving sheriffs. If there is a pattern emerging, it is that when sheriffs are engaged in jail management, law enforcement, or personnel administration, courts are more likely to find that they are local policymakers, recognizing that Alabama's change in law to incorporate its sheriffs into the state government does not generally parallel laws in other states. On the other hand, when sheriffs faithfully execute court processes – such as writs or warrants – courts generally find that sheriffs act on behalf of the state, much like prosecutors

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[16] This distinction between prosecutorial and law officer functions is mirrored in California's immunity law; there is absolute immunity for malicious prosecution, whether by the prosecutor or a police officer, and potential liability for false arrest and imprisonment. *See Asgari v. City of Los Angeles*, 15 Cal.4th 744, 937 P.2d 273, 63 Cal.Rptr.2d 842 (1997).

do. In other words, the lower courts have adhered to the Court's direction that the question of state-versus-local authority be resolved on a state-by-state and function-by-function basis, and appear to have encountered little difficultly doing so.

1. Jail Management and Administration

Noting that *McMillian* recognized that a sheriff's policymaking capacity would vary from state to state, courts not addressing Alabama law have uniformly found that sheriffs are local officials regarding jail policies. *See Ramsey v. Schauble*, 141 F.Supp.2d 584 (W.D.N.C. 2001); *DeGenova v. Sheriff of DuPage County*, 209 F.3d 973 (7th Cir. 2000) (Illinois). In contrast, *Turquitt v. Jefferson County*, 137 F.3d 1285 (11th Cir.), *cert. denied*, 525 U.S. 874 (1998), applied the *McMillian* analysis to Alabama and recognized that even though *McMillian* had concluded that Alabama sheriffs were state policymakers for law enforcement purposes, a new examination had to be performed for the jail-management function. *Turquitt* concluded that the reasons underlying the unusual role of sheriffs in Alabama state government made sheriffs state policymakers in their jail management function as well as in their law enforcement function.

2. Law Enforcement.

Several courts outside Alabama have determined that, in exercising law enforcement functions, the sheriff is a local or county policymaker. For example, in *Abraham v. Piechowski*, 13 F.Supp.2d 870 (E.D. Wis. 1998), the court,

after noting that "*McMillian* recognized that the importance of counties and the nature of county government may vary from state to state, which can impact a court's characterization of the sheriff," found that under the Wisconsin law (a statutory and constitutional framework like that of California, originally derived from the laws of New York) the sheriff was a local policymaker. *Id.* at 879. Similar decisions have been made in Tennessee, *Spurlock v. Sumner County*, 42 S.W.3d 75 (Tenn. 2001), and Illinois, *Franklin v. Zaruba*, 150 F.3d 682 (7th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999). Under Texas law a sheriff is a county law enforcement policy maker. *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999). The Fourth Circuit has, upon careful analysis in light of *McMillian*, reaffirmed its view expressed in *Harter v. Vernon*, 101 F.3d 334 (4th Cir. 1996), *cert. denied*, 521 U.S. 1120 (1997), that North Carolina sheriffs are local policy makers for law enforcement purposes. *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219 (4th Cir. 2001). In *Open Inns, Ltd. v. Chester County Sheriff's Department*, 24 F.Supp.2d 410, 413 (E.D. Pa. 1998), the court found a sheriff's policy of allowing deputies to assist private parties in seizing personal property without "any inquiry into the legality of such actions" ("don't ask, don't think") to be that of a local policymaker.

On the other hand, *Fletcher v. Georgia*, 92 F.Supp.2d 1377 (S.D. Ga. 2000), applied *McMillian* and decided that Georgia had "cede[d] to counties no meaningful level of control over a sheriff's law enforcement activities," *id.* at 1380, and that Georgia sheriffs are not county policymakers. Given their proximity and shared history, it is

not surprising that Alabama and Georgia would have similarities in their governmental structures.[17]

3. Employment and Personnel Policies

Several courts have found that in matters of employment and personnel policies, sheriffs who have the power to hire, fire and discipline department employees act in a local policymaking capacity. *See, e.g., Jeffes v. Barnes*, 208 F.3d 49 (2d Cir.), *cert. denied sub nom. County of Schenectady v. Jeffes*, 531 U.S. 813 (2000); *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999); *Aleman v. Milwaukee County*, 35 F.Supp.2d 710 (E.D. Wis. 1999).

4. Staffing Courts and Executing Process

In *Alencastro v. Sheahan*, 297 Ill.App.3d 478, 698 N.E.2d 1095 (1998), the court was confronted with a suit arising from the service of an eviction writ. The court found that "the defendant was a state actor in executing the court order for possession," relying on Illinois law

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[17] *McMillian* cited a study "explaining how regional influences have resulted in different forms of county government in different States" and listing Alabama in the lowest third of all states in the amount of discretionary authority granted to its counties. 520 U.S. at 795. The same study places Georgia near the lowest third, while California is in the upper third, the group of states granting the most discretionary authority to counties. De Santis & Renner, *Governing the County*, in *County Governments in an Era of Change* 19, Table 2.1 (P. Berman ed. 1993).

requiring that "sheriffs shall serve and execute all warrants, process, orders, and judgments of every description that may legally be directed or delivered to them." *Id.* at 483, 698 N.E.2d at 1099.

These and other cases[18] decided in the four years since *McMillian* underscore *McMillian's* clarity and the uniformity with which its analysis has been applied – even though, as should be the case in light of *McMillian's* analytical framework, the outcome varies from state-to-state and from function-to-function.

III. LIABILITY OF THE SHERIFF'S DEPARTMENT – ITSELF A SEPARATE SUABLE ENTITY – IS NOT ADDRESSED BY THIS PETITION

In *Streit*, the Ninth Circuit found that the Los Angeles Sheriff's Department is a separate entity separately subject to suit, 236 F.3d at 565-66, and rejected the claim that it is an "arm of the state" immune from liability under the Eleventh Amendment, *id.* at 566-67. Thus, the court below held that the sheriff could be sued in his

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[18] *McMillian* has also been applied to decide whether particular officials other than sheriffs are state or local policymakers. *Burge v. Parish of St. Tammany*, 187 F.3d 452 (11th Cir. 1999) (holding district attorneys to be local); *Carter v. City of Philadelphia*, 181 F.3d 339 (3d Cir.) (same), *cert. denied sub nom. Roe v. Carter*, 528 U.S. 1005 (1999); *Myers v. County of Orange*, 157 F.3d 66 (2d Cir. 1998) (district attorney's blanket policy of not accepting cross-complaints in criminal cases was local, despite the fact that district attorneys would be immune from liability for *initiating* prosecutions), *cert. denied*, 525 U.S. 1146 (1999); *Pharris v. Looper*, 6 F.Supp.2d 720 (M.D. Tenn. 1998) (holding county assessors to be local).

official capacity for the policies applied at the county jail *either* as a final policymaker for the county *or* as a final policymaker for the sheriff's department. In the petition for writ of certiorari, petitioners challenge only the determination that the sheriff is the final policymaker for the county, and do not object to *Streit*'s determination that the sheriff's department is subject to *Monell* liability arising from jail management practices.

Other circuits recognize that a sheriff who might not be, under the applicable state scheme, a county official, is not therefore necessarily a state official. The argument that a sheriff who is not a county policymaker therefore represents the state "overlooks a crucial third possibility that we have found to be dispositive in other cases – namely that the sheriff is an agent of the county sheriff's department, an independently-elected office that is not subject to the control of the county in most respects." *DeGenova v. Sheriff of DuPage County*, 209 F.3d 973, 976 (7th Cir. 2000) (citing *Franklin v. Zaruba*, 150 F.3d 682, 685 (7th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999)); *see Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000) (county not liable for employment decision of sheriff, but sheriff liable in his official capacity as head of the sheriff's department, an independent non-state entity subject to suit).

Because petitioners do not challenge the decision below insofar as it finds that the sheriff's department is a separately liable local entity, and because the sheriff is the final policymaker for the sheriff's department, the matter will proceed on the merits even if certiorari is granted

and the finding with respect to the county is reversed. For this reason too, certiorari should be denied.

CONCLUSION

For the foregoing reasons, respondents urge the Court to deny the petition for certiorari.

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